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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 179

CECIL L. COURTNEY, PHILIP T. FERRIS,
AND RAY PARKS,
PETITIONERS,

vs.

TY LOCKETT,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS.

REPLY BRIEF OF PETITIONERS.

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INDEX TO BRIEF.

	Page
STATEMENT	1
SUMMARY OF ARGUMENT:	
I	1
II	2
III	3
ARGUMENT AND AUTHORITY:	
I	4
II	11
III	16
CONCLUSION	22

TABLE OF CASES CITED.

Page

Brown v. Allen, 344 U. S. 443.....3, 13, 15, 16

Cooke v. United States, 267 U. S. 517.....3, 17, 18, 21

Ex Parte Spencer, 228 U. S. 652.....2, 15

Gibbs v. Burke, 337 U. S. 773..... 2, 9

Hawk v. Olson, 326 U. S. 271.....3, 15, 16

Herndon v. Lowry, 301 U. S. 242.....3, 15, 16

In Re Dill, 32 Kan. 668.....2, 12

In Re Ferris, 175 Kan. 704.....1, 4, 15

In Re Jewett, 69 Kan. 830.....2, 12

McGoldrick v. Compaignie Generale Transatlantique, 309 U. S. 430..... 4

Offut v. United States, 75 S. Ct. 11..... 21

Re William Oliver, 333 U. S. 257.....3, 10, 17, 18. 20, 21

Sacher v. United States, 343 U. S. 1.....3, 19, 20

Savin, Petitioner, 131 U. S. 267..... 17

Schlemmer v. Buffalo R. & P. R. Co., 205 U. S. 1.... 2, 9

Toledo Newspaper Co. v. United States, 247 U. S. 402 .....3, 20-21

Wallace v. Weber, 134 Kan. 201.....2, 12

Whalen v. Cristell, 161 Kan. 747.....2, 14

Woolsey v. Best, 299 U. S. 1.....2, 15

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STATEMENT.

Petitioners deem it necessary to file a brief in reply to the brief for respondent to refute the arguments made and to correct certain erroneous statements contained therein.

SUMMARY OF ARGUMENT.

I.

The Federal questions specified in the Petition for Certiorari were before the Supreme Court of Kansas, and decided adversely to petitioners. *In re Ferris,* 175 Kan. 704. (R. pp. 180-182-185)

Where a Federal question is raised and the judgment of a lower court could not have been reached without tacitly or implicitly deciding the Federal question, this Court will take jurisdiction; although the opinion below does not expressly determine the question raised, or says nothing about it. *Schlemmer v. Buffalo R. & P. R. Co.*, 205 U. S. 1.

Meticulous insistence upon formal regularity is foreign to the purposes of habeas corpus. *Gibbs v. Burke*, 337 U. S. 773.

Where the full record and undisputed references to the briefs of the parties indicates that Federal questions were raised in the court below in habeas corpus proceedings and determined therein this Court may assume jurisdiction on certiorari.

II.

Habeas corpus is proper under Kansas law where the jurisdiction of the court under whose process petitioners are deprived of their liberty is questioned. *In re Dill*, 32 Kan. 668; *In re Jewett*, 69 Kan. 830; *Wallace v. Weber*, 134 Kan. 201; *Whalen v. Cristell*, 161 Kan. 747.

Respondent's objection to the jurisdiction of the Supreme Court of Kansas is res judicata as that court determined the jurisdictional issue adversely to respondent in the habeas corpus proceeding. *Woolsey v. Best*, 299 U. S. 1; *Ex parte Spencer*, 228 U. S. 652.

Where a state court treats habeas corpus as permissible and hears a petition therefor on its merits, no question of state procedure for reexamination of criminal con-

victions by direct appellate review arises. *Brown v. Allen*, 344 U. S. 443; *Hawk v. Olson*, 326 U. S. 271; *Herndon v. Lowry*, 301 U. S. 242.

III.

Contempts subject to summary punishment are those committed in open court and which if not summarily punished would tend to discredit the authority of the court in the eyes of the public. *Cooke v. United States*, 267 U. S. 517; *Re William Oliver*, 333 U. S. 257; *Sacher v. United States*, 343 U. S. 1.

A judgment of conviction for contempt of court must be rendered in public. *Re William Oliver*, supra; *Sacher v. United States*, supra.

The judicial power to summarily punish for contempt is limited to that necessary to preserve order and decorum in court, and to compel obedience to valid orders of the court; and should not be exercised in the latter instance without observing due process of law. *Toledo Newspaper Co. v. United States*, 247 U. S. 402 (dissent); *Cooke v. United States*, 267 U. S. 517; *Re William Oliver*, 333 U. S. 257; *Sacher v. United States*, 343 U. S. 1 (dissent).

ARGUMENT AND AUTHORITY.

I.

Respondent asserts:

> "This court is without jurisdiction since the questions presented herein were not raised below or called to the attention or decided by the state court."

Respondent states that the case at bar is governed by *McGoldrick v. Compaignie Generale Transatlantique*, 309 U. S. 430, wherein it was said, at p. 434:

> " . . . In cases coming here from state courts, *in which a state statute is assailed as unconstitutional there are reasons* . . . which should lead us to refrain from deciding questions not presented or decided in the highest court of the state whose judicial action we are called upon to review. Apart from the reluctance with which every court should proceed *to set aside legislation as unconstitutional on* grounds not porperly presented, due regard for the appropriate relationship of this Court to state courts requires us to decline to consider and decide questions affecting the validity of state statutes not urged or considered there." (Emphasis supplied)

Petitioners submit that the validity or constitutionality of the statute pursuant to which the inquisition in the instant case was conducted has not been contested at any stage of the proceedings herein. In support of this, petitioners cite *In re Ferris*, 175 Kan. 704, 267 P. 2d 190, R. 179, wherein the Supreme Court of Kansas, after reciting the inquisition statute verbatim, said:

> "Counsel for petitioners, with commendable frankness, concede that the time of the inquiry they believed the inquisition was 'entirely legal' but that it was conducted in an illegal manner in certain par-

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ticulars. They now state the inquisition was wholly illegal and that the above statute does not authorize it."

The position of counsel for petitioners to which the opinion refers, and as appears elsewhere therein, was that the inquisition statute was limited by its terms to inquiries into three specific types of offenses. The Supreme Court of Kansas held contra, and petitioners are bound thereby and have not and do not now complain of that particular ruling in this Court. The validity or constitutionality of the statute referred to was never questioned below or here. It is clear, therefore, that *McGoldrick* does not control the case at bar.

Petitioners submit, however, that the Federal questions specified in their petition for certiorari were before the Supreme Court of Kansas, and its judgment or decree could not have been pronounced without deciding them.

It should be borne in mind that (as appears in the record, pp. 1 to 8) Ferris and Courtney were convicted and sentenced sometime after 5:30 p. m. on January 18; their applications for writs were filed in the Supreme Court of Kansas on January 20. Parks was convicted after 6:30 p. m. on January 20, and his application for a writ was filed on January 22. Petitioners, after sentence, were immediately committed to the county jail of Sedgwick County, at Wichita. The applications for the writs were filed in the Supreme Court, at Topeka, 175 miles away, as soon as humanly possible in order to effect the release of petitioners from the alleged illegal restraint.

The applications were necessarily hastily drawn but, nevertheless, squarely presented the Federal issues stated in the petition for certiorari. They recite in part:

> "Your petitioner further shows this court that the said District Court . . . has exceeded the authority conferred upon it by G. S. 1949, 62-301, *by conducting said inquisition in secret and by denying your petitioner the right to confer with counsel* . . . (Emphasis supplied)
>
> " . . . that your petitioner has been deprived of his liberty without due process of law . . . " (R. pp. 1 to 8)

The proceeding at which the applications were heard was original in the Supreme Court. No evidence or testimony was taken, but, nevertheless, the many affidavits and exhibits which were submitted by petitioners and respondent, the briefs of the parties and amicus curiae, and the oral arguments which were considered by the Supreme Court of Kansas clearly presented the constitutional questions. That the court below was aware of the Federal nature of the issues involved and recognized their import is indicated in its opinion, where it is said (R. 180):

> "Petitioners assert the inquisition, *as conducted*, violated the fifth, sixth and fourteenth amendments to the federal constitution and section ten of the Kansas bill of rights. The pertinent portion of the fifth amendments reads: (Emphasis supplied by petitioners)
>
> 'No person shall be . . . compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law. . . .' (Our italics)

"The sixth amendment, insofar as material provides:

'In all *criminal prosecutions*, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense.' (Our italics)

"The essential part of the fourteenth amendment states:

' . . . No state shall make or enforce any law which shall *abridge the privileges or immunities* of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, *without due process of law* . . .'" (Our italics)

As can be readily observed, the Supreme Court of Kansas not only recognized the portions of the Federal Constitution which petitioner contended were involved, but emphasized the phrases which it considered particularly pertinent.

Petitioners frankly concede that at the outset of this litigation they were convinced that they were entitled to discharge under the laws and constitution of the state, and placed their reliance largely upon legal authorities and arguments to that end. However, it is also asserted that the Federal questions, express and implicit, involved were urged upon the court below and never relinquished, as evidenced by the fourth paragraph of petitioners' motion for rehearing (R. 193) where they said:

> "Petitioners respectively (sic) urge the court to reconsider the Constitutional and Federal questions heretofore raised."

Pointing further to the existence and recognition of the Federal questions which petitioners raised below and

which are now relied upon here, is the statement of the supreme court in its opinion (R. 185):

> "Petitioners argue the sentences and commitments for direct contempt are invalid in that they violate constitutional and statutory provisions. Briefly stated, petitioners assert they were accused of contempt, tried, convicted, sentenced and committed without formal charges first having been preferred against them, and without evidence or counsel."

The court below does not mention the secrecy which petitioners also asserted in their applications for writs (R. pp. 1 to 8) and in their affidavits attached to their replies (R. pp. 152, 153, 154, 155), but which clearly appears in the record.

A careful reading of the opinion below discloses that the Kansas court disposed of the federal questions on the bases that the fifth and sixth amendments pertained only to criminal prosecutions, and in any event, would not apply to the power of the state with respect to its own citizens. It was said in the opinion (R. 182):

> "It must be remembered constitutional guaranties relied upon by petitioners, *except the fourteenth amendment* to the federal constitution, apply only to criminal prosecutions." (Emphasis supplied)

The court directly held that the inquisition was not a criminal prosecution and that the fifth and sixth amendments were not applicable. However, no further reference is made to the fourteenth amendment which petitioners contended conferred the privileges and immunities afforded by the fifth and sixth amendments to the petitioners in their character as citizens of Kansas. The

court below did not ~~affirmatively~~ expressly decide that the sentences and commitments were not in contravention of the due process clause of the fourteenth amendment, but it is submitted that the decree denying the applications for writs of habeas corpus implicitly so rules.

In *Schlemmer v. Buffalo, R. & P. R. Co.*, (1905), 205 U. S. 1, 11, 51 L. ed. 681, 27 S. Ct. 407, in an opinion by Justice Holmes, it was said:

> "We certainly do not mean to qualify or lir the rule that, for a court to entertain jurisdicti of a writ of error to a state court, it must appear affirmatively that the state court could not have reached its judgment without tacitly, if not explicitly deciding the Federal matter. (Citing cases.) But, on the other hand, if the question is duly raised and the judgment necessarily, or by what appears, in fact involves such a decision, then this court will take jurisdiction, although the opinion below says nothing about it."

In *Gibbs v. Burke*, (1948), 337 U. S. 773, 93 L. ed. 1686, 69 S. Ct. 1247, petitioner in his petition for habeas corpus alleged that in the proceeding which resulted in his conviction he "was denied counsel and through ignorance of law and fact was forced to act as his own counsel" and "that he was denied his constitutional rights as set forth in the Ten Original Amendments, Article VI." This court said in its opinion, at p. 779:

> "Two procedural points require but brief attention. The federal question was adequately if inartistically raised in the petition for a writ of habeas corpus. We consider insignificant under these circumstances the fact that petitioner cited the Sixth rather than the Fourteenth Amendment to the Con-

> stitution. Meticulous insistence upon regularity in procedural allegations is foreign to the purpose of habeas corpus."

Petitioners concede that the applications for writs in the cases at bar may very well have been "inartistically" drawn due to the time available to counsel to prepare them. However, it is earnestly submitted that the Federal issues were raised therein, however inartistically stated, and were subsequently urged at every stage of the proceedings. It is also submitted that the Supreme Court of Kansas considered those issues, and implicitly decided that the conviction and confinement of petitioners was not in contravention of the "due process" clause of the fourteenth amendment.

Respondent quotes a statement out of context from petitioners' brief. It is stated at p. 21 of respondent's brief:

> "They (petitioners) admit, however, that the 'due process' was never mentioned."

The statement referred to appears at p. 24 of petitioners' brief, and an entirely different connotation is apparent when quoted fully:

> "It is true the term 'due process of law' was not employed in the *quoted portion* of petitioners' brief." (Italics added)

As previously indicated, petitioners have asserted from the outset that their convictions and sentences were contrary to "due process of law" (R. pp. 1 to 8 incl.).

Respondent apparently complains because petitioners did not rely on *Re William Oliver*, 333 U. S. 257, in the

proceeding below. It is true the *Oliver* case, supra, was specifically drawn to petitioners' attention in the brief amicus curiae filed by the Attorney General (and served on petitioners on the day of the hearing). By the same token, and in the oral argument as well, it is also true that the cited case was drawn to the supreme court's attention, and was as lightly considered by it as by petitioners.

Petitioners submit that in the light of the record and the references to the briefs of the parties filed below, which are not disputed by respondent, the federal questions, as presented in the petition for certiorari herein (p. 4) were adequately raised by the petitioners and implicitly decided adversely to them by the Supreme Court of Kansas. And, that therefore, there is no merit in respondent's contention that this Court is without jurisdiction.

II.

Respondent next argues that petitioners are not entitled to writs of habeas corpus because they failed to exhaust their state remedies, which included an appeal from conviction for contempt. The short answer to this contention is that petitioners attacked their convictions and restraint on the ground that they were unconstitutional and void which they were permitted to do under Kansas procedure.

The law of Kansas clearly gives petitioners the right to challenge their convictions for contempt by proceedings in habeas corpus inquiring into the legality of any judgment

whereby the party is in custody " . . . for any contempt of any court, office or body having authority to commit . . . " The Supreme Court of Kansas has repeatedly held that the quoted provision of the Kansas statute (G. S. 60-2213) does not apply in the case of persons held for contempt where the order committing such persons was made without jurisdiction. *In re Dill,* (1884), 32 Kan. 668, 5 Pac. 39; *In re Jewett,* (1904), 69 Kan. 830, 77 Pac. 567; *Wallace v. Weber,* (1931), 134 Kan. 201, 5 P. 2d 835.

The Supreme Court of Kansas, in the case at bar, had no doubt as to its jurisdiction to consider the issues raised by petitioners' applications for writs of habeas corpus. It said in its opinion (R. 179):

> " . . . These are original proceedings in this court. Fundamental rights pertaining to the liberty of citizens are involved and the court is not inclined to rest its decisions on technicalities. We shall fully consider petitioners' contentions as now made . . . "

Respondent now contends that petitioners should have proceeded by appeal rather than by habeas corpus. He says the errors of which petitioners complain are "technical" and it is suggested that petitioners may not properly invoke the jurisdiction of this court until or unless they exhaust the remedy of direct appellate review afforded by the State of Kansas.

Petitioners submit that subsequent to the decision of the Supreme Court of Kansas in the original proceedings in habeas corpus, appellate review of their convic-

tions would have been futile, as the highest court of that state had announced that it had fully considered petitioners' contentions as then made. The identical issues before that court in the habeas corpus proceeding would have only been relitigated on appeal.

In *Brown v. Allen*, (1952), 344 U. S. 443, 97 L. ed 469, 73 S. Ct. 397, where convictions in capital cases were appealed to the court of last resort in the state, and petitions for certiorari to this court were denied, and subsequently petitions for writs of habeas corpus were filed in Federal district court and denied, and reached this court on certiorari, it was said in the opinion at p. 448:

> "It is not necessary in such circumstances for the prisoner to ask the state for collateral relief, based on the same evidence and issues already decided by direct review with another petition for certiorari directed to this Court."

Counsel for petitioners appreciate the import of the far reaching issues discussed and determined in the cited case. They also appreciate that the short statement quoted above does not accurately reflect the importance of the opinions filed. However, it is urged that where the issues have been determined by the highest court of a given jurisdiction in original habeas corpus proceedings it would gain nothing to relitigate the identical issues by direct review of the proceedings in which the petitioners for habeas corpus have been deprived of their liberty. With all respect for the delicate relationships involved in a federal system of government, this would

not seem to be a case where empty procedural form should be required.

The suggestion by respondent that the Supreme Court of Kansas was without jurisdiction to consider the issues presented by petitioners is completely without merit. In any event, the question of the jurisdiction of that court is now res judicita, as it, in fact, assumed jurisdiction in the face of respondent's contention in the first paragraph of each of the answers filed in the original proceeding in habeas corpus below (R. 12, 41 and 82), that the Kansas court did not have jurisdiction.

The Supreme Court of Kansas has consistently liberally applied the remedy of habeas corpus, even in instances where direct appellate review might also have been available to a petitioner.

In *Whalen v. Cristell,* (1946), 161 Kan. 747, 173 P. 2d 252, in Syllabus No. 1, the court said:

> *"In habeas corpus proceedings the right of a petitioner to be released depends entirely upon the validity of his restraint on the date of the filing of his petition, and, notwithstanding statutory provisions restricting the issuance of the writ when it appears the petitioner's rights may be protected by appellate review, this court will (1) when in issue always inquire into and determine* questions pertaining to the validity and sufficiency of the commitment on its face to justify the restraint and *the jurisdiction of the court issuing the process . . . "* (Emphasis supplied)

In accordance with the rule announced above the Supreme Court of Kansas implicitly overruled the jurisdictional issue raised by respondent in his answer and

heard the matters on their merits and determined them adversely to the petitioners. Now, respondent contends that petitioners must seek direct appellate review of the identical issues in the same forum. Petitioners submit that their original applications for writs of habeas corpus were based, in part, upon the lack of jurisdiction of the committing judge to convict and sentence the petitioners in secrecy and without counsel, thus depriving them of their liberty without due process of law. Those grounds were certainly sufficient to warrant inquiry by the supreme court in the habeas corpus proceedings and constituted more than "technical errors" to be corrected by direct appellate review. There is no indication in the opinion of the Supreme Court of Kansas (R. 173-189 incl.) that its decision in the cases at bar rested upon the ground that habeas corpus was not the proper remedy. In fact, the opinion clearly states the contrary, where it is said:

> "We shall fully consider petitioners' contentions as now made." (175 Kan. 704, 708, R. 179)

The judgment of the Supreme Court of Kansas, with respect to the jurisdictional issue raised by respondent's traverse of petitioners' applications is now res judicata. *Woolsey v. Best*, 299 U. S. 1, 57 S. Ct. 2, 81 L. ed. 3; *Ex parte Spencer*, 228 U. S. 652, 33 S. Ct. 709, 57 L. ed 1010.

In *Brown v. Allen*, (1953), 344 U. S. 443, 486, supra, it was said, citing *Hawk v. Olson*, (1945), 326 U. S. 271 and *Herndon v. Lowry*, (1937), 301 U. S. 242:

> " . . . this Court will review state habeas corpus proceedings even though no appeal was taken, if the state treated habeas corpus as permissible."

In the *Hawk* case, supra, it was said at p. 278:

> "As the Supreme Court of Nebraska considered the motion for continuance on its merits, no question of state procedure for the reexamination of criminal convictions arises."

In *Herndon v. Lowry,* supra, it was said, at p. 247:

> "The scope of a habeas corpus proceeding in the circumstances disclosed is a state and not a federal question and since the state court treated the proceeding as properly raising issues of federal constitutional right, we have jurisdiction and all such issues are open here."

Petitioners submit that the rationale of *Brown v. Allen, Hawk v. Olson* and *Herndon v. Lowry,* supra, applied to the cases at bar must result in the conclusion that since the Supreme Court of Kansas treated the instant cases as properly before it in original habeas corpus proceedings and determined them on their merits, this Court may properly take jurisdiction on certiorari.

III.

Respondent states in his brief (p. 3) that the judicial proceedings which resulted in petitioners' convictions and sentences for contempt are "unhappily denominated an 'inquisition'." However unhappy the nomenclature might be, it remains substantially accurate. Respondent contends that the judge before whom the inquisition pro-

ceedings were conducted acted only in a judicial capacity. Petitioners submit that their characterization of the presiding official at those proceedings, as developed at pp. 18, 19 and 20 of their principal brief herein, presents that official in true perspective. The Court's attention is directed particularly to pp. 95, 96, 97, 98 of the Record of petitioner Parks' interrogation; pp. 101 and 102 of the Record with reference to the petitioner Ferris; and pp. 106, 107, 125, 127, 128, 135 and 136 of the Record in the case of Courtney.

The record plainly discloses an attitude on the part of the judge not ordinarily associated with an impartial arbiter, or consonant with the demeanor of a judge in open court. Respondent chooses to use the term *in facie curiae* rather than the term "open court" which petitioners have opted and which has been used by this Court in the leading cases of direct or criminal contempt which it has been called upon to review. *Savin, Petitioner*, 131 U. S. 267; *Cooke v. United States*, 267 U. S. 517; *Re William Oliver*, 333 U. S. 257.

Petitioners submit that there is a substantial distinction in the meaning of the term used by respondent and that used by petitioners with reference to the power of a court to deal summarily with contempt. This is so particularly in the case of convictions and sentences *in camera* because of the possibility, even probability, of abuse of judicial power. There is nothing to restrain the judicial officer from wreaking full and instant vengeance for affronts to his authority, real or imagined. If the term "in the face of the court" means the same

as "open court", why, then, the concern of this Court, and the authorities from Bentham to Wigmore, with the need and desirability of public hearings in criminal prosecutions for contempt, as well as other offenses?

Respondent contends that it is impossible to discern any benefit to petitioners arising from public observance of punishment for their conduct, where no evidence is required nor defense permitted. The answer to the contention is, of course, inherent in the decisions of this Court where it has insisted that trials for contempt, even where committed in *facie curiae*, be held in open court. *Re William Oliver*, 333 U. S. 257, 275; *Cooke v. United States*, 267 U. S. 517, 534. In the *Cooke* case, supra it was properly said:

> "We think the distinction finds its reason, not any more in the ability of the judge to see and hear what happens in the open court than in the danger that, unless such an open threat to the orderly procedure of the court and such a flagrant defiance of the person and presence of the judge before the public in the very 'hallowed place of justice,' as Blackstone has it, is not instantly suppressed and punished, demoralization of the court's authority will follow . . .
>
> "When the contempt is not in open court, however, there is no such right or reason in dispensing with the necessity of charges and the opportunity of the accused to present his defense by witnesses and argument."

Conceding, arguendo, that petitioners were guilty of contempt in *facie curiae*, as respondent puts it: Does respondent contend there was a necessity to deprive the

petitioners of advice of counsel before proceeding to convict and sentence them summarily *in camera?* Was the dignity of the "court" better vindicated in the eyes of the public by its swift exercise of authority when the public was not even aware that petitioners were being interrogated, let alone that they were guilty of disobedience of an order of the court? Petitioners submit it was not, unless terror of judicial authority by the public be the desideratum.

Respondent cites *Sacher v. United States,* (1953), 343 U. S. 1, 72 S. Ct. 451, 96 L. ed. 717, as authority for his statement to the effect that this Court has rejected petitioners' contention that summary punishment for contempt may only be exercised to forestall demoralization of a court's authority before an attending public. (Respondent's Brief p. 32)

Petitioners submit that a careful consideration of the *Sacher* case discloses no rejection of their contention as stated by respondent. Rather, the majority opinion of this Court refers to the conduct of the contemnor as interfering with "the expeditious, orderly and dispassionate conduct of the trial" (p. 5); and implies that behavior such as charged against *Sacher* is contrary to "The interests of society in the preservation of courtroom control by judges . . . " (p. 8). The opinion states, at p. 9:

> "Reasons for permitting straightway exercise of summary power are not reasons for compelling or encouraging its immediate exercise."

Of course, the facts of *Sacher* are easily distinguished from those of the case at bar. In the cited case the contemnors had engaged in a bitterly contested trial in *open court* for a period in excess of six months. The contemnors, with one exception, were members of the bar, and their conduct of the case, as indicated by its stormy history,[1] was certainly deserving of censure, if not summary punishment.

This Court, in its majority opinion in the *Sacher* case, said, at p. 10:

> " . . . but we have held that a contempt judgment must be public . . . "[2]

Petitioners submit that the *Sacher* case, relied upon by respondent, does not support his argument that a judge may summarily punish for contempt *in facie curiae in camera.*

It is submitted that the better rule is that the judicial authority to summarily punish contempt should be limited to the power adequate to preserve order and decorum and to compel obedience to valid court orders; and should never be exercised without benefit of the constitutional safeguards of due process of law, except in instances where the court must act to preserve order and decorum in the courtroom.

The rule above stated has its foundation in the dissenting opinion of Mr. Justice Holmes in *Toledo Newspaper*

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1. **United States v. Sacher,** (2d Cir.) 182 F. 2d 416; **United States v. Dennis,** (2d Cir.), 183 F. 2d 201; **Dennis v. United States,** 341 U. S. 494, 71 S. Ct. 857, 95 L. ed. 1137.

2. **In re Oliver,** 333 U. S. 257, 68 S. Ct. 499, 92 L. ed. 682.

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Co. v. United States, (1918), 247 U. S. 402, 425-426, 38 S. Ct. 560, 62 L. ed. 1186, wherein it was said:

> "I would go as far as any man in favor of the sharpest and most summary enforcement of order in court and obedience to decrees, but when there is no need for immediate action contempts are like any other breach of law and should be dealt with as the law deals with other illegal acts."

The dissent of Justice Holmes has been substantially followed by the majority of this Court in the later cases of *Cooke v. United States*, 267 U. S. 517, and *Re William Oliver*, 333 U. S. 257.

Respondent relies on a line of cases which begins and ends in the nineteenth century. The cases he relies upon have been repeatedly limited and narrowed; and, despite their venerability, not one case supports the proposition for which he contends: that is, the validity of convictions and sentences for contempt rendered in secret, and in deprivation of counsel. A possible exception to the above is *Ex parte Nugent*, (C. C. D. C.), Fed. Cas. No. 10,375, 1 Hayw. & H. C. C., 1 Brunner's Coll. Cases 296, which in 1848 affirmed a judgment of the United States Senate of conviction for contempt. The contempt and conviction both occurred, apparently, at a secret session of the Senate.

The latest reported case involving contempts and their summary punishment is *Offut v. United States*,.. U. S. .., 75 S. Ct. 11, decided November 8, 1954, in which the conviction and sentence of an attorney for contempt was reversed. The case is not in point with the instant

case as the alleged contemptuous conduct and the conviction therefor took place in open court, and involved 42 (a) of the Federal Rules of Criminal Procedure. However, with reference to the power of courts to punish contempts summarily, this Court used the following language, at p. 13 of the Advance Sheet:

> "It is a mode of vindicating the majesty of the law, in its active manifestation, against obstruction and outrage."

Petitioners submit that their conduct in refusing to answer the questions propounded by their inquisitors did not "outrage" or obstruct the majesty of the law in such a manner as to justify their summary convictions and sentences in secret and without counsel; and, that the law under which they were summarily sentenced and convicted would have been served as well had they been permitted to confer with counsel and to have a trial, or at least a hearing, of their contentions which they advanced in support of their refusal to answer.

CONCLUSION.

The Federal issues raised by petitioners in their pleadings, evidence, briefs and oral argument in the Supreme Court of Kansas were: (1) May witnesses at an inquisition proceeding be accused, tried, convicted and sentenced to imprisonment for contempt of court in secret?; and (2), Does the failure to allow such witnesses an opportunity to confer with counsel of their choice when accused of contempt in a secret proceeding, or to afford a hearing or an opportunity to defend themselves prior

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to conviction and sentence for contempt, constitute a denial of due process of law?

The decision of the Supreme Court of Kansas denying the petitioners writs of habeas corpus necessarily and implicitly determined that the denial of counsel to petitioners, the failure to afford them an opportunity to be heard or defend before conviction, and the denial of a public trial of the alleged contemptuous conduct did not constitute a denial of due process of law as contemplated by the Fourteenth Amendment to the Constitution; and, therefore, this Court may assume jurisdiction.

There is no merit to respondent's contention that petitioners did not exhaust their state remedies before petitioning this Court for certiorari, by not seeking direct appellate review of their convictions and sentences for direct contempt of court. The Supreme Court of Kansas heard petitioners' applications for writs of habeas corpus on the merits and fully considered their contentions and determined them adversely to petitioners. Petitioners may properly petition this Court for review of that determination since the state of Kansas treated habeas corpus as permissible.

The rule for which petitioners contend is that the judicial authority to punish contempts is limited to the power adequate to preserve order and decorum in open court, and to compel obedience to valid orders of the court. Summary power should not be exercised without the traditional safeguards to life and liberty afforded by the due process of law contemplated in the Fifth and Fourteenth Amendments to the Constitution,

except in instances where it is necessary to act to preserve order and decorum in open court.

For these reasons the decree of the Supreme Court of Kansas should be reversed and remanded to that court with instructions to dispose of the petitioners' applications for writs of habeas corpus consonant with the Fourteenth Amendment to the Constitution.

Respectfully submitted,

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